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**Review and analysis of the Ukrainian Law
on the protection of public morality**

by

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**ANALYSIS OF THE LAW OF UKRAINE
ON THE PROTECTION OF PUBLIC MORALS**

*"Democracy thrives on freedom of expression"*¹.

BY PROFESSOR DR. DIRK VOORHOOF

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- A. I have been asked by the Secretariat of the Council of Europe to review Ukraine's Law on the Protection of Public Morals, voted by the Ukrainian Parliament on 20 November 2003 (N° 1296-I), as well as to indicate whether it contains any important problematic areas and, in the affirmative, to formulate suggestions or recommendations that may be considered necessary in order to align the law with the relevant Council of Europe standards.
- B. The principal source of European standards regarding freedom of expression is Article 10 of the European Convention on Human Rights. This says:
- "(1) Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.*
- "(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*
- C. There is a substantial body of jurisprudence from the European Court of Human Rights which has elaborated on the meaning of the Convention, including Article 10. It would be beyond the scope of this review to give a detailed account, but the main principles developed by the Court include the following:
- a. The presumptive right to freedom of expression in Article 10(1) is very broad, both in terms of the people who have that right² and the types of expression

¹ *United Communist Party of Turkey and Others v Turkey*, 30 January 1998, § 57.

² Legal persons, such as private companies, media enterprises or commercial organisations have also a right to freedom of expression: *Autronic AG v Switzerland*, 22 May 1990, *Demuth v Switzerland*, 5 November 2002 and *Krone Verlag GmbH & CO KG (n° 2) v Austria*, 6 November 2003.

that are protected³. As “everyone” has the right to freedom of expression, the curtailment of anyone’s freedom must be justified according to the criteria set out in Article 10(2). Because all types of expression are included in Article 10(1), any restrictions on any type of expression must similarly meet the requirements of Article 10(2) if there is not to be a violation of the Convention. Freedom of expression is guaranteed “regardless of frontiers”.

- b. According to the Court’s case law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. This freedom is subject to the exceptions set out in Article 10(2), which must, however, be construed strictly and the need for any restrictions must be established convincingly.
- c. It is readily apparent from Article 10 that the right of freedom of expression is not absolute. In certain circumstances, interferences with it are permitted, but three conditions must be satisfied:
 - i. The restriction on freedom of expression must be “prescribed by law”. It must, of course, be lawful under the domestic law of the state concerned. But the Court has said that that “law” must also satisfy minimum European standards. In particular, the law must be accessible. The law must also be reasonably certain so that those affected can determine with a reasonable degree of certainty, following legal advice if necessary, whether their activity is within the law’s application (“foreseeability”). Compatibility with the rule of law implies that there must be a measure of protection in national law against arbitrary interferences with the right of freedom of expression.
 - ii. The restriction must be for a “legitimate aim”. This means for one of the purposes listed in Article 10(2), *inter alia* the protection of morals.
 - iii. The restriction must be necessary in a democratic society. It is this last requirement which has produced the most argument in cases before the Court. In essence, this means that the interference must correspond to “a pressing social need” and must be proportionate to the end which is being pursued. The consideration is whether this end could be reasonably achieved by a measure that was less restrictive of freedom of expression.
- D. In evaluating national laws restricting freedom of expression and information as protected by Article 10 of the Convention, one must keep in mind that the national authorities are left *a certain margin of appreciation* in proclaiming and applying that law. The margin of appreciation can vary according to the circumstances or the characteristics of the interference. The margin of

³ Commercial advertisements are also protected under Article 10 Convention: *Barthold v Germany*, 25 March 1985; *Casado Coca v. Spain*, 24 February 1994 and *Krone Verlag GmbH & Co KG (n°3) v Austria*, 11 December 2003.

appreciation is extremely narrow with regard to interferences on political speech or on debate on questions of public interest. On the other hand, member states have a wider margin of appreciation with regard to the protection of “morals”, the protection of children and with regard to “commercial speech” or advertising.

- E. It is to be emphasised that the application of national legislation restricting the freedom of expression and information must in all cases be in accordance with Article 10 of the European Convention. Article 1 of the Convention requires member states to secure for everyone within their jurisdiction the rights and freedoms guaranteed by the Convention. The rights and freedoms of the Convention are directly enforceable before the national courts (self-executing character of the Convention, internal and direct effect of the Convention in member states). International treaties on fundamental human rights take precedence of national legislation. Hence, freedom of expression and information as guaranteed by Article 10 of the European Convention must be respected and applied by all authorities in Ukraine (legislators, government and administration, police and judiciary), in line with the jurisprudence of the European Court of Human Rights. The supervisory competence of the Strasbourg Court is there (only) to control the full application of the Convention’s rights and freedoms in member states. As the President of the European Court noticed in a press release of 21 June 1999 *“firm political commitment is needed to ensure the Convention is respected at national level. Governments, legislators and the judiciary in member states need to work together to enforce the Convention and all its articles and protocols (..)”*⁴.

⁴ ECourHR, Press release, 21 June 1999 (“*Steep rise in workload for European Court of Human Rights*”).

Observations

Three basic issues of criticism with regard to Ukraine's Law on Public Morals can be highlighted from the perspective of Article 10 of the European Convention on Human Rights protecting freedom of expression:

1. The Law contains provisions which restrict freedom of expression and the distribution of media products **in an imprecise way**. Hence, some of the provisions do not meet the criterion of Article 10(2) of the Convention ("prescribed by law"). Especially the provisions restricting the production, publishing, distribution and broadcasting of "sexual" or "erotic" materials refer to unclear perceptions and notions and are not sufficiently precise to legitimate restrictions on freedom of expression.

- "Sexual material" is to be understood as printed matter, audio, video, advertising or any communication, message or content, mass media product, including electronic media **"designed for the satisfaction of human sexual needs"**.

- "Erotic material" is to be understood as printed matter, audio, video, advertising or any communication, message or content, mass media product, including electronic media **"which contains erotic material, aims at achieving aesthetic effect, is designed for adults, does not arouse base instincts in the audience and is not offensive"**.

The law contains many restrictions on freedom of expression regarding these types of materials, while the interpretation of what is to be considered as sexual or erotic material or "erotic elements" is extremely unclear. It can also be questioned whether such restrictions are "necessary" in a democratic society.

Other provisions which do not meet the condition of "prescribed by law" from the perspective of foreseeability are:

- the prohibition to make or distribute material which promotes "substance abuse, tobacco smoking and **other bad habits**" (Section 2)5;
- the prohibition to advertise for "intimate contacts for consideration or of **deviant forms of intimate relations**" in non-specialised media (Section 6)6;
- the prohibition to use images of minors **in any form in sexual or erotic material** (Section 7);
- the prohibition to advertise in the media any text, visual or sound information capable **causing harm to moral health of the public** (Section 14);
- the competence given to the NECUPPM to "prevent distribution and prohibit the showing of motion picture films, programmes, information material, performance activities etc. that are **prejudicial to public morals**" (Section 19).

⁵ According to the Strasbourg Court, the notion "*bonos moros*" is not sufficiently precise and gives no minimal guidance to determine what is in breach with (public) morals. The Court has underlined that "*given the lack of precision referred to above, it cannot be said that what the applicants were being bound over not to do must have been apparent to them*". As "*bonos moros*" is to be understood as "*behaviour which is wrong rather than right*", the restriction refers to a conduct "*which is not described at all, but merely expressed to be 'wrong' in the opinion of the majority of citizens*": *Hashman and Harrup v United Kingdom*, 25 November 1999, § 32.

⁶ What are "normal" and what are "deviant" forms of intimate relations?

Leaving the interpretation of the above provisions to the evaluation of the **National Evaluation Committee of Ukraine of the Protection of Public Morals** (NECUPPM) does not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society.

2. The law has a ***too broad scope of application***, in so far as it prohibits, according to Section 2, par. 3, the distribution of material which:

- *promotes war, national or religious hostility, change of constitutional government or territorial integrity of Ukraine by force;*
- *promotes fascism and neo-fascism;*
- *discredits or insults the nation or any person on ethnic grounds;*
- *promotes disrespectful attitude to national and religious sanctities;*
- *promotes ignorance and disrespect for parents, and*
- *promotes substance abuse and tobacco smoking or other bad habits.*

Paragraph 3 of Section 2 should not be integrated in a law restricting or prohibiting specific media content because of its sexual-pornographic character. The prohibitions of paragraph 3 of Section 2 are to be considered as “political speech” or relate to information and opinions on matters of public interest⁷. Some of these provisions also have a vague and unclear character and do not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society.

Furthermore, with regard to ***incitement to violence and racism or “hate speech”***, the existing provisions in criminal law are considered to be applicable to media content as well. It can be argued that there is no need for additional provisions.

3. The Law sets out several licensing procedures and different forms of ***prior restraint*** which can be considered as violating Article 10 of the Convention. In particular, the broad range of far-reaching competences afforded to the **National Evaluation Committee of Ukraine of the Protection of Public Morals (NECUPPM)** holds a virtual risk for disproportionate interferences with freedom of expression by public authorities in Ukraine.

According to Section 8, the distribution of sexual or erotic material is allowed only on the basis of a “positive conclusion” of the NECUPPM and according to the “manner determined by public authorities and institutions of local self-government within their jurisdiction”.

Section 9 requires a “special permit (license)” for import, export and distribution of any media-content “of sexual character”.

⁷ See recently: *Müslüm Gündüz v Turkey*, 4 December 2003, § 43.

A prior licensing⁸ is also prescribed for the production, broadcasting and distribution of “erotic or sexual motion picture films, audio and video products” (Section 9). Any sexual, audio, radio, cinema or video material with erotic elements is subject to evaluation by the NECUPPM (Section 13).

The sale and distribution of any printed matter or graphic arts of “sexual or erotic character” is allowed only in specially designed places and after a “positive conclusion” by the NECUPPM (Section 11).

The NECUPPM has the duty to prevent and prohibit the showing of motion picture films, programmes, information material, performance activities etc. that are prejudicial to public morals (Section 19).

⁸ By the National Broadcasting Council of Ukraine.

Conclusion & recommendations

The above mentioned observations lead us to the general conclusion that *Ukraine's Law on the Protection of Public Morals, regardless of some valid, pertinent intentions and some legitimate provisions and restrictions, is a disproportionate interference by public authorities in freedom of expression, as guaranteed by Article 10 of the European Convention of Human Rights.*

I. It is recommended to re-draft the law in a fundamental way, *focusing* on the *protection of minors* (including from the perspective of the active role of the state to stimulate media-content and programmes which contribute to the social, mental and cultural development of children).

II. The provisions concerning "*sexual and erotic material*" require a thorough revision, or rather should be repealed. The way these provisions are formulated in the actual law on the protection of public morals, they contain concepts and introduce restrictions which are not sufficiently foreseeable and do not offer a minimum degree of protection against arbitrariness required by the rule of law in a democratic society. These provisions can also be interpreted too broadly or have a too wide range of application. Neither is it pertinently demonstrated that there is a "pressing social need" for the provisions regarding "sexual and erotic material". Therefore, these provisions are to be considered as illegitimate and/or disproportionate interferences with freedom of expression.

III. It is to be emphasised that respect for public morals in a society cannot be enforced (solely or functionally) by prohibitions on all kinds of expressions, restrictions on the dissemination of all kinds of "sexual or erotic material" and prohibitions of some types of media-content, under a (licensing) control by state authorities. Several Declarations and Recommendations of the Committee of Ministers emphasise the importance of the development of *self-regulation, co-regulation and the absence of prior state control in the field of journalistic ethics, the protection of minors and content restrictions on the Internet*.

IV. With regard to the provisions prohibiting the production, distribution, advertising and broadcasting of *pornography and obscene material*, it can be considered necessary but also sufficient to have these provisions under *judicial control*, with all the guarantees of Article 6 of the Convention ("fair trial" and "impartiality and independence of the court").

V. With regard to cinema and broadcasting, the already existing legal provisions can be considered as a sufficient regulatory basis, so that there is no need for any additional provisions for these sectors in the framework of the law on protection of public morals or more specifically the protection of minors. If need be, the provisions with regard to *broadcasting* can be updated or further developed, esp. in conformity with the European Convention of Transfrontier Television and the "Television without Frontiers" Directive 98/552/EG (modified 97/36/EG) of the European Union (Article 22).

⁹ See *inter alia*, Declaration on freedom of communication on the Internet, 28 May 2003 (principles 3 and 5); Recommendation Rec(2001)8 on self-regulation concerning cyber content, 5 September 2001 and Recommendation R(90)10 on cinema for children and adolescents, 19 April 1990. See also Resolution No. 2 "Journalistic Freedoms and Human Rights", 4th European Ministerial Conference on Mass Media Policy, *The Media in a Democratic Society*, Prague, 7-8 December 1994.

Short overview of the Law on the Protection of Public Morals

a. The law, as it is communicated to the Council of Europe, contains no separate Explanatory Memorandum.

b. The general purpose of the law is formulated in the introductory sentence that “this law gives legal foundation to *protecting the society* against dissemination of material that affects *adversely public morals*”. According to Section 5, the aim is to create the conditions to promote the exercise of the right to an information space “free from material posing a threat to physical, intellectual, moral or psychological state of the public”. A central monitoring Commission is held responsible “for the promotion of healthy lifestyles and appropriate morality of the society and controls the circulation of sexual or erotic material and performance activities” (Section 17).

c. The law contains **22 Sections**, structured as follows:

Section 1, Definitions

Including what is to be understood as “pornography”, “erotic material”, “obscene material” and “sexual material”.

“Public morals” is to be understood, according to the law, as “a system of ethical norms and rules of conduct, which has evolved in the community on the basis of traditional spiritual and cultural values, perception of good, honour, dignity, civil duty, conscience and justice”.

Section 2, General provisions

On the one hand, this provision refers to the specially designed executive agency for culture and arts, which has the competence to determine the criteria on which any material is to be considered as “obscene”.

On the other hand, reference is made to “erotic material” as well as “any material containing elements of violence and cruelty” that will be subject to statutory restrictions.

This section also contains some additional prohibitions, *inter alia*, the prohibition to promote war, to promote the change of the government or territorial integrity of Ukraine by force, to discredit or insult the nation or any person on ethnic grounds and the promotion of “tobacco smoking or other bad habits”.

- Section 3, Public Morality Law

This provision refers to other laws¹⁰ containing provisions on the protection of public morals.

¹⁰ Reference is made both to the Constitution of Ukraine, “other laws and statutes on protection of public morals” and to the “generally recognised standards of principles of international law and international treaties of Ukraine”.

- **Section 4, Scope of operation**

Indicates that the operation of the law extends to the activities of the public authorities and institutions of local self-government, of organisations, both public and private, legal persons and individuals in the area of circulation of the relevant material in the territory of Ukraine, as well as beyond its national boundaries, "where citizens of Ukraine and legal persons registered under effective laws of Ukraine are subjects of legal relations".

The second paragraph of Section 4 provides some exemptions regarding the application of the law: the law does not apply to the production of documentary matter, works of art, literature or culture¹¹, research, science and educational material on the issues of sex and sexual products designated for medical purposes.

- **Section 5, Primary areas of government regulation of information material adversely affecting public morals**

Apart from the explanation of the essence of the public policy in the area of public morals ("the creation of the (...) conditions to promote the exercise of the right to an information space free from material posing a threat to physical, intellectual, moral or psychological state of the public"), Section 5 enumerates the "primary purposes" of the government regulation in this area. It is said to be the government's policy, *inter alia*, "to prevent the promotion of violence and cruelty and dissemination of obscene material in electronic and other media" and "to control the circulation of material posing a threat to public morals".

- **Section 6-8**

These sections contain the provisions prohibiting the production and distribution of obscene and pornographic material (Section 6), formulating special guarantees to protect the moral and psychical life of minors (Section 7) and restricting the distribution of sexual and erotic material (Section 8). Distribution of sexual and erotic material is only allowed on the basis of a positive conclusion of the NECUPPM, exclusively in restricted places ("specialised shops") and under restricted conditions. The distribution of sexual material in public places is prohibited. Sexual and erotic material that may be distributed to adults must be made inaccessible to minors.

- **Section 9, Terms and procedure of licensing the circulation of sexual and erotic material**

This Section prohibits the importation and distribution of sexual material in Ukraine, unless a special licence is obtained.

For the broadcasting of sexual and erotic motion picture films and of other audiovisual programs or video products, a licence from the National Broadcasting Council of Ukraine is needed. The distribution of this kind of material for only a restricted audience is under the control of the central executive authority in the area of culture and arts. Licences issued by foreign state authorities or institutions have no effect in the territory of Ukraine.

¹¹ Under the condition, however, that these works of art, literature or culture "are recognised to be part of the classical or world artistic heritage", which is also an extremely arbitrary criterion.

- **Section 10, Expert evaluation**

This Section provides that expert evaluation forms the basis for the admissibility or the circulation of sexual or erotic material. Expert evaluation can be performed at any stage of the circulation of sexual and erotic material, while it precedes the dissemination of such material.

- **Section 11, Terms of sale and distribution of sexual or erotic printed matter**

The prior control by the NECUPPM is reaffirmed in Section 9, providing that the sale and distribution of any printed manner of sexual or erotic character is allowed subject only to a positive conclusion of the NECUPPM and under strict conditions.

- **Section 12, Procedure or organisation and conduct of sexual or erotic performance activities**

This Section reaffirms the possibility to perform sexual or erotic performances, after a licence is obtained from the NECUPPM and in as far as this is organised in specially designated places, in compliance with the appropriate sanitary and hygienic standards stipulated by the legislation in force.

The licence for performing sexual and erotic performances does not include any demonstration of pornography, promotion of violence or cruelty.

- **Section 13, On erotic content in the mass media**

There is a total ban on the broadcasting of programmes containing elements of pornography.

It is reaffirmed that the broadcasting of any "sexual material with erotic elements" is subject to an evaluation by the NECUPPM. The broadcasting of "material with sexual or erotic character" is only allowed for specialised media who must encrypt the signals, while the broadcasting of programmes containing erotic elements is only allowed from 24:00 to 04:00 am. The broadcasting of any sexual or erotic material must be preceded by a sound or text message advising the character of such a programme.

Non-respect or violation of these provisions with regard to the broadcasting of sexual and erotic material will result in the revocation of the broadcasting licence in accordance with the legal provisions in force.

The distribution (sale and rental) to the general public of any electronic mass media of sexual character, audio- or videotape containing sexual or erotic elements is subject to an evaluation by the NECUPPM and "a licence and other necessary documents as defined by the effective legislation". A similar double control and licensing system is applicable to "cinema theatres, video rentals, video halls" that show sexual or erotic motion picture films or video material.

- **Section 14, Advertising and marketing sexual and erotic material**

This section prohibits, *inter alia*, that advertising uses texts, visual or sound information "capable of causing harm to moral health of the public".

Advertising for sexual or erotic material, performances or activities is subject to a special permit (licence) and is allowed only in specialised media, in application of “the effective legislation”.

Advertising in the public sphere containing texts and/or images of sexual or erotic character is prohibited.

- **Section 15, Supervision and control**

This Section enumerates the different authorities with controlling and/or monitoring competences in the area of the protection of public morals:

- the Ministry of Culture and Arts;
- the Ministry of Health;
- the Ministry of Justice;
- the Ministry of Education;
- the Ministry of Internal affairs;
- the State Office of the Public Prosecutor;
- the State Customs Service;
- the State Broadcasting Committee;
- the National Broadcasting Council;
- the NECUPPM.

The authority that has issued the relevant licence may, in cases of infringement of the law, also issue warnings, apply penalties and suspend or revoke the licence or refer the case to the public prosecutors office or court.

- **Section 16, Competences of the Parliament, the President and the Cabinet of Ministers**

According to this section, the Parliament, the President and the Cabinet of Ministers may develop and promulgate further provisions for the implementation of the law protecting public morals in Ukraine. The Cabinet of Ministers is expected to co-ordinate and control the activities of the ministries and other central bodies in this sphere.

- **Section 17, Status of the NECUPPM**

The NECUPPM is the permanent state expert and controlling body with regard to the provisions of the actual law. The NECUPPM is responsible “for the promotion of healthy lifestyles and appropriate morality of the society and controls the circulation of sexual or erotic material and performance activities”. The NECUPPM is financed by the state budget.

- **Section 18, Composition of the NECUPPM**

The membership of the NECUPPM is approved by the Cabinet of Ministers of Ukraine. The members may not have any financial interest in any mass media or broadcasting organisation.

- Section 19, Competences of the NECUPPM

This provision enumerates the primary tasks, the duties and the rights of the NECUPPM, *inter alia*:

- to control compliance with the law on the protection of public morals;
- to prevent the distribution and prohibit the showing of films, programmes, material, performance activities “that are prejudicial to public morals”;
- to initiate procedures for revoking a licence for circulation of sexual material and performance activities where this Law is violated.

Section 20, Expert evaluation of sexual or erotic material or performance

The purpose of expert evaluation (by the NCUPPM) is the preparation of a conclusion as to the conformity of sexual or erotic material to the legislation on the protection of public morals and the admissibility of its circulation on the territory of Ukraine.

The conclusion of the NCUPPM can be appealed in court according to the rules of civil procedure.

Section 21, Liabilities

Breach of the provisions of the law on the protection of public morals may entail “civil, disciplinary, administrative or criminal liability, as provided for by Ukrainian legislation in force.

Section 22, Implementation procedure

The law comes into effect on the date of its publication. Within three months, all laws and statutory acts are (to be) harmonised with the provisions of this law. Within six months the necessary statutes, regulations and budget estimates have to be approved in order to install the NECUPMM.